UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - - - X

JOANN ABBO-BRADLEY, JOANN ABBO-BRADLEY AS PARENT AND NATURAL GUARDIAN OF D.B., JOANN ABBO-BRADLEY AS PARENT AND NATURAL GUARDIAN OF T.B., JOANN ABBO-BRADLEY AS PARENT AND NATURAL GUARDIAN OF C.B., ZACHERY HERR, MELANIE HERR, ZACHARY HERR AS PARENT AND NATURAL GUARDIAN OF C.H., ZACHARY HERR AS PARENT AND NATURAL GUARDIAN OF H.H., ELENA KORSON, ELENA KORSON AS PARENT AND NATURAL GUARDIAN OF L.K., NATHAN E. KORSON,

Plaintiffs

vs.

CITY OF NIAGARA FALLS, NIAGARA FALLS WATER BOARD, GLENN SPRINGS HOLDINGS, INC., CONESTOGA-ROVERS & ASSOCIATES, CECOS INTERNATIONAL, INC., MILLER SPRINGS REMEDIATION MANAGEMENT, INC., OCCIDENTAL CHEMICAL CORPORATION INDIVIDUALLY AND AS SUCCESSOR IN INTEREST TO HOOKER CHEMICALS AND PLASTICS CORPORATION, OP-TECH ENVIRONMENTAL SERVICES, ROY'S PLUMBING, INC., SCOTT LAWN YARD, INC., AND SEVENSON ENVIRONMENTAL SERVICES, INC.,

Defendants.

- - - - - - - - - - - - - - - - - - - X

20-CV-136(G)

Buffalo, New York
May 28, 2020
2:11 p.m.

TRANSCRIPT OF VIDEO PROCEEDINGS
BEFORE THE HONORABLE JEREMIAH J. MCCARTHY
UNITED STATES MAGISTRATE JUDGE

AUDIO RECORDER: Joanna Dickinson

TRANSCRIBER: Christi A. Macri, FAPR-CRR-RMR-CSR(CA/NY)
(585) 613-4310
100 State Street, Room 2120
Rochester, New York 14614

(Proceedings recorded by electronic sound recording, transcript produced by computer).

A P P E A R A N C E S

WATERS & KRAUS, LLP
BY: CHARLES S. SIEGEL, ESQ.
LESLIE C. MACLEAN, ESQ.
PETER A. KRAUS, ESQ.
3141 Hood Street, Suite 720
Dallas, Texas 75219
- and -
CHRISTEN CIVILETTO, ES.
8313 West Point Drive
East Amherst, New York 14051
- and -
PHILLIPS & PAOLICELLI, LLP
BY: MELISSA L. STEWART, ESQ.
747 Third Avenue, 6th Floor
New York, New York 10017
Appearing on behalf of the Plaintiffs

CITY OF NIAGARA FALLS
BY: THOMAS J. DEBOY, ES.
Department of Law, P.O. Box 69
Niagara Falls, New York 14302
Appearing on behalf of City of Niagara Falls

RUPP, BAASE, PFALZGRAF, CUNNINGHAM & COPPOLA LLC
BY: CORY JOHN WEBER, ESQ.
424 Main Street, Suite 1600
Buffalo, New York 14202
Appearing on behalf of Niagara Falls Water Board

PHILLIPS LYTLE LLP
BY: ANDREW P. DEVINE, ESQ.
DEENA KATHERINE MUELLER-FUNKE, ESQ.
KEVIN M. HOGAN, ESQ.
One Canalside, 125 Main Street
Buffalo, New York 14203-2887
- and -
DECHERT LLP
BY: DOUGLAS E. FLEMING, III, ESQ.
SHEILA L. BIRNBAUM, ESQ.
Three Bryant Park
1095 Avenue of the Americas
New York, New York 10036
Appearing on behalf of Occidental Chemical Corporation, Glenn Springs Holdings, Inc. And Miller Springs Remediation Management, Inc.

ALSO PRESENT: Frank Parigi
Anthony Young

APPEARANCES

HODGSON RUSS LLP
BY: JEFFREY C. STRAVINO, ESQ.
The Guaranty Building, Suite 100
140 Pearl Street
Buffalo, New York 14202-4040
Appearing on behalf of Conestoga-Rovers & Associates

GREENBERG TRAURIG, LLP
BY: ZACKARY KNAUB, ESQ.
54 State Street, 6th Floor
Albany, New York 12207
Appearing on behalf of CECOS International, Inc.

PILLINGER MILLER TARALLO, LLP
BY: JEFFREY D. SCHULMAN, ESQ.
507 Plum Street, Suite 120
Syracuse, New York 13204
Appearing on behalf of OP-Tech Environmental Services

THE KNOER GROUP, PLLC
BY: ALICE J. CUNNINGHAM, ESQ.
424 Main Street, Suite 1820
Buffalo, New York 14202
Appearing on behalf of Roy's Plumbing, Inc.

SUGARMAN LAW FIRM LLP
BY: BRIAN F. SUTTER, ESQ.
1600 Rand Building
14 Lafayette Square
Buffalo, New York 14203
Appearing on behalf of Scott Lawn Yard, Inc.

HURWITZ & FINE, P.C.
BY: AGNIESZKA ANNA WILEWICZ, ESQ.
DAVID R. ADAMS, ESQ.
PATRICIA ANN RAUH, ESQ.
1300 Liberty Building
Buffalo, New York 14202
Appearing on behalf of Sevenson Environmental Services, Inc.

PROCEEDINGS

* * *

THE CLERK: Judge McCarthy, good afternoon.

MAGISTRATE JUDGE MCCARTHY: Good afternoon, everyone.

THE CLERK: Judge, I think we have everyone -- someone for every party except the City of Niagara Falls.

MAGISTRATE JUDGE MCCARTHY: Okay. Anybody know where they are?

UNIDENTIFIED SPEAKER: No, Your Honor. (Indiscernible) for the plaintiff.

MAGISTRATE JUDGE MCCARTHY: Joanna, who is counsel for the city?

THE CLERK: Tom Deboy and Tom O'Donnell.

MAGISTRATE JUDGE MCCARTHY: Okay, do you want to just try to shoot them an e-mail? And they can join in. I'm not gonna hold up everything for them.

Matt Yusick, I believe you're on the line, maybe you could do that?

MR. YUSICK: Judge, I'll take care of it right now.

THE CLERK: That would be great, thank you. I've lost my office connection, so I apologize.

MAGISTRATE JUDGE MCCARTHY: Okay.

THE CLERK: Judge, whenever you're ready I can -- I can call the case and go through who is appearing.

MAGISTRATE JUDGE MCCARTHY: All right, you may do

so, please.

THE CLERK: On the record in civil proceeding No. 20-CV-136 through 20-CV-155, we are here today for an oral argument being held by video.

The lead cases for purposes of today's argument is Abbo-Bradley, et al. vs. City of Niagara Falls, et al..

For various plaintiffs in this matter appearing are Charles Siegel, Christen Civiletto, Leslie MacLean, Melissa Stewart and Peter Kraus.

For the defendant Niagara Falls Water Board, Cory Weber.

For defendants Glenn Springs Holdings, Inc., Miller Springs Remediation Management, Inc. and Occidental Chemical Corporation, we have Kevin Hogan, Deena Mueller-Funke and Andrew Devine.

Also for Occidental we have Sheila Birnbaum, Frank Parigi and Anthony Young.

For Conestoga-Rovers & Associates, Jeffrey Stravino.

For CECOS International, Inc., Zachary Knaub.

For OP-Tech Environmental Services, Jeffrey Schulman.

For Roy's Plumbing, Inc., Alice Cunningham.

For Scott Lawn Yard, Inc., Brian Sutter.

And for Sevenson Environmental Services, Anna

Wilewicz, Patricia Rauh and Dave Adams.

The Honorable Jeremiah J. McCarthy presiding.

MAGISTRATE JUDGE MCCARTHY: All right, good afternoon everyone. And, Joanna, after going through all that I should just let you take the rest of the day off.

THE CLERK: Phew!

MAGISTRATE JUDGE MCCARTHY: I hope -- I hope everybody's doing well under these unusual circumstances and I will -- let me just begin by saying to all of you that I have read the papers carefully, although not for the last time; I will be reading them perhaps one or two more times.

But with that in mind we can proceed. How many -- how many counsel are going to be arguing?

MR. SIEGEL: Your Honor, this is Charles Siegel for the plaintiffs. I will be making the argument. I do have my co-counsel Mr. Kraus and Ms. Stewart and Ms. MacLean are also present in the hearing and I would ask that if there is a question or something to do with what has gone on in state court, that they be allowed to -- to speak; they're perhaps more familiar with the goings on in state court, but I will be handling the argument.

MAGISTRATE JUDGE MCCARTHY: Okay, thank you. And how about for the defendants?

MR. FLEMING: And, Your Honor, this is Doug Fleming for Occidental defendants. I'm not sure if my appearance is

noted, but similar to what Mr. Siegel said, I'll be arguing on behalf of the Occidental defendants together with co-counsel Mr. Hogan at Phillips Lytle who may participate on additional issues as well, but the plan is for me to conduct the argument.

I'm not aware that any other defendants are planning on arguing.

MAGISTRATE JUDGE MCCARTHY: Okay, thank you. And when you mention Kevin Hogan, I just want to reiterate what I have said to you all in the past is that up to 2007 I was a partner at Phillips Lytle where Kevin, I believe, is now the managing partner.

I may -- I don't believe I handled any cases for Occidental, but I have no further connection with that firm, financial or otherwise, and that has no bearing on my handling of the case, and I believe the parties have previously agreed to that disclosure.

In any event, why don't we get going? And I guess -- there are a number of issues here, one of which, though, I'd like both counsel to address with respect to timeliness as we lead off and then we can get into other issues.

I understand that there are many arguments made as to timeliness of the removal of the third amended complaint, but one of those arguments is -- or I should say timeliness or

untimeliness, one of the arguments is that the clock should have started running with the state court scheduling order saying that the -- the plaintiffs could -- or setting a date by which the plaintiffs would file an amended complaint.

Now, that doesn't strike me -- and I've seen the reference to the cases that say that a court order granting leave to amend can start the clock running, but I think normally in that context there has been a specific pleading identified by way of a motion for leave to amend. And so when the Court gives its imprimatur to the filing of that amended pleading, that starts the clock running, but doesn't seem that we have that scenario here.

I mean, it was a scheduling order that said by -- I believe it was January 6th or whatever date it was, the plaintiffs would file, but there was no identification at that time of specifically what the third amended complaint would be. I know there had been various drafts exchanged.

So at least as to that argument, as I sit here right now, I'm not overly persuaded, but I'll certainly hear from counsel on both sides of that issue.

MR. SIEGEL: Thank you, Your Honor, this is Charles Siegel for the plaintiffs.

MAGISTRATE JUDGE MCCARTHY: Yes.

MR. SIEGEL: And I will address that argument initially, but I will say it is -- it is our secondary time

limits argument, not our --

MAGISTRATE JUDGE MCCARTHY: I understand that, but it's one that I can get my arms around perhaps --

MR. SIEGEL: Okay.

MAGISTRATE JUDGE MCCARTHY: -- more readily than some of the others. So I wanted to address that first.

MR. SIEGEL: Understood. The reason that we say that removal should have been triggered no later than November 26th, 2019 when the state court signed its scheduling order is that, yes, the cases that the defendants rely on typically involve a situation in which there's been a motion for leave to amend and the defendant has opposed that motion, and the defendant has seen the proposed amended complaint or knows what the substance of the new allegations is going to be, but there's no certainty yet whether those allegations are going to come into the case because the state court may or may not grant leave to amend.

We don't have a motion for leave to amend in this case. What -- there was never -- as the defendants harp on, there was never a motion for leave to amend and, therefore, there was never any uncertainty about whether amendment would be granted and no need for the parties to wait for the state court to decide whether or not to grant leave to amend.

Here it was all agreed and so we say it would be the supreme exultation of form over substance to say, well,

removal was never triggered because there was no formal motion and, thus, no formal order.

What you had on November 26th was Judge Kloch in state court saying I have entered this text -- he enters the text docketing order with a scheduling order on the same day stating, quote, this is the quote from Judge Kloch's order, the plaintiffs will file amended complaints as the defendants have consented by January 6th, 2002.

So what you have is not a situation in which there was uncertainty in state court. You have defendants all along for the process extending back nearly a year, all along saying, okay, we understand, this is what you're going to amend with and we understand you're going to make these amendments, let's negotiate about, well, we see you've added these plaintiffs and these former plaintiffs should have been not added because they were already dropped from the case and so on.

But the substance of the amendments -- in other words, the allegations about the new sources of exposure, were in the case from -- from early in 2019.

And then what Judge Kloch said on November 26th is the plaintiffs shall file the amended complaints as the defendants have consented. That takes the place of what you have in the other cases that the defendants rely on, the normal practice of motion and state court decision. Their

leading case is this case from the District of Vermont called *Israel vs. Volkswagen* and this is what is -- what that court says at 2016 WL 9344707*7, he says that the Second Circuit cases talking about removal being triggered by the service of something other than a formal complaint are inapplicable because there is a proposed amendment that, quote, may or may not be granted.

We didn't have that uncertainty in this case. We had an agreement. Judge Kloch endorsed that agreement saying, well, November 26th, here the defendants have consented to the filing of these amended complaints.

And so the purpose of that rule that triggers removal upon the receipt of the amended complaint is fulfilled. There was no uncertainty, which is the point of the other cases that the defendants rely on.

I hope I've explained our position about that.

MAGISTRATE JUDGE MCCARTHY: Yes, but weren't there -- I mean, didn't there continue to be negotiations about what the exact language would be even after the date of Judge Kloch's order?

MR. SIEGEL: I don't believe so, Your Honor, no. I don't believe there were any -- I don't believe there were any further negotiations about the substance of the complaint.

And there were further stipulations thereafter and on January 2nd the defendants signed a stipulation, on the

6th we filed the complaint, but there was no further negotiation. The process of exchanging complaints, draft amended complaints ended, I believe, on November 26th.

And, again, it has to be borne in mind, there was no -- there was no uncertainty about the substance here. What had gone on for many months prior to November of 2019 was simply a process by which the plaintiffs were weeding out certain named claimants in the various amended complaints or to be amended complaints.

There was no change of the substance whatsoever way before November 26th.

MAGISTRATE JUDGE MCCARTHY: Okay.

MR. FLEMING: Your Honor, may I be heard?

MAGISTRATE JUDGE MCCARTHY: Who is -- Mr. Fleming? I'm certainly going to turn to you.

MR. FLEMING: Sure, thank you, Your Honor. I didn't mean to interrupt you.

But some of what Mr. Siegel said, you know, I think unintentionally is just simply not accurate. There was no specified agreed complaint that was ever presented to Justice Kloch; there was no specified agreed complaint as of November 27th.

In fact, Mr. Hogan's affidavit shows that the amended complaint continued to change after November 27th, despite the statements you just heard. On December 6th, 2019

plaintiffs' counsel proposed to dismiss more plaintiffs. On December 27th defendants identified more errors in the complaint and the record is absolutely clear that on January 3rd they finally e-mailed the final revised drafts and the stipulation was entered on January 3rd, 2020.

Ultimately it was filed with the Court on January 6th, 2020. We removed within 30 days of both of those dates.

There was never a set pleading that was agreed to or that was presented to Justice Kloch prior to that date.

The plaintiffs also go back and cite a November 15th letter from Mr. Hogan whereby they claim that we agreed to the complaints, notwithstanding the record shows that they continued to change after that.

But they omit -- the letter specifically says there's a tentative agreement conditioned on plaintiffs simultaneously filing proposed amended complaints in the other 18 lawsuits, and the parties expect that in the near future they will be in a position to present to the Court the 19 proposed amended complaints and stipulations to permit the filings.

And it's clear from the face of that stipulation that was entered that the agreement was contingent on defendants agreeing to the form of all 19 complaints and that they all be filed at the same time.

So this is very much, you know, unlike a situation

even where a proposed amended complaint is submitted to the Court, now the minority rule, not the majority, finds that the notice of removal is triggered on a proposed amended complaint being submitted to the Court.

But most courts say, you know what? That would be premature to remove of course until you know what the claims are in the case.

Here we're a step removed from that. We didn't have a proposed amended complaint submitted to the Court or an agreement as to any specified complaint. I mean, can you imagine if we filed with the Court a draft amended complaint as a basis for removal? I think the Clerk wouldn't be too happy with us and might bounce it on its face. I think the Court as a matter of policy wouldn't be too happy with premature removals based on draft complaints to which the plaintiffs hadn't committed and to which there was no stipulation.

So I agree with Your Honor, I think you can easily dispense with this notion that these draft complaints -- a time to removal. The record is -- is -- can't be contradicted. The stipulation was signed on January 3rd and first presented to the Court on January 6th.

MAGISTRATE JUDGE MCCARTHY: All right. Well, Mr. Fleming, I'm going to caution you and I'm going to caution everybody, don't agree with me on anything yet because I don't

know for certain, you know, which way I'll come down. But I'm just -- and as I ask questions going forward, don't read too much into any question. I'm just wrestling with all of these issues.

But what -- Mr. Fleming, let me ask you then, what is the significance of the statement in Judge Kloch's November 26th order "as defendants have consented"?

MR. FLEMING: Yeah, I --

MAGISTRATE JUDGE MCCARTHY: You wouldn't agree to something that you didn't know what it was going to entail, would you?

MR. FLEMING: Yeah, I think, Your Honor, what Justice Kloch was getting at was exactly what the stipulation says, that if the -- if the plaintiffs were to present 19 complaints in acceptable format, the defendants would be prepared to stipulate to their filing so long as they were all filed at the same time.

And that's what the stipulation says, and I think that is what Justice Kloch is getting at.

And further, you know, the record does show, Your Honor, that subsequent to that there continued to be draft complaints exchanged, underscoring that the stipulation was not actually entered and agreed to and signed until January 3rd when we had the full collection of complaints to which we agreed.

MAGISTRATE JUDGE MCCARTHY: Okay. All right, thank you. Now, let me -- and I'm going to give every -- Mr. Siegel, rest assured, I'll give you full opportunity to argue as I will you, Mr. Fleming, but I want to get my preliminary questions out of the way first.

Mr. Fleming, to you for a moment, the other aspect of timeliness or untimeliness is what is really new about the amended -- the third amended complaint in terms of grounds for removal other than it does identify different -- different sites, but in terms of the legal issues raised, what is new?

What was not or could not have been presented to Judge Curtin back in 2013?

MR. FLEMING: Thank you, Your Honor. And what could not have been presented to Judge Curtin back in 2013 are the operative facts that have been added to this case that form the basis for the current removal.

The plaintiffs are alleging essentially entirely new sites that supposedly are sources of exposure that relate -- relate to separate conduct that gives rise to federal officer removal and federal question jurisdiction that by definition could not have been raised previously because they were not in the complaint.

We think the *O'Bryan* case is very instructive on this, Your Honor, and that's under -- it shows that this removal would be timely under 1446(b)(3). That's out of the

Tenth Circuit. Importantly there, Your Honor, the Tenth Circuit clarified that when you look at sort of what's new, you don't necessarily look at the legal theory.

So in other words, if federal question jurisdiction was asserted previously as a grounds for removal, that doesn't mean you can't later raise federal question jurisdiction. It makes very clear that you look at the new set of operative facts that are alleged, which may give rise to a similar and same legal theory. That doesn't mean it's the same grounds for removal.

The *MG* case out of the Western District of New York also cited that very same principle. So in that Tenth Circuit case, Your Honor, *O'Bryan,* it was a libel action that was filed. The defendant removed it. It happened to be a judge, believe it or not, and the judge moved under color of federal office. The District Court remanded it back to state court.

Later the plaintiff actually changed the libel that it was identifying and identified a different publication for the libel. The defendant removed again and the same legal theory under color of federal officer, but a different set of factual allegations, different bases, different operative facts, different libel.

So the Court looked at 1446(b)(3), right? And 1446(b)(3), which we're relying on, has a couple of requirements and I'll just read it, Your Honor, because I

think it's important to frame it or paraphrase it.

If the case stated by initial pleading is not removable, a notice of removal may be filed within 30 days after receipt by the defendant -- and it goes on -- through service or otherwise, amended pleading or other paper from which it first may be ascertained that the case is one in which is or has become removable.

So looking at that first question, right? Was the initial action removable, the Tenth Circuit looked at the District Court opinion and decision on that, just like we have here, and didn't take long to determine that the initial action was not removable because the District Court judge found such.

So the first requirement was satisfied. The initial action was not removable. This wasn't a case where there was no prior removal; there was a prior removal. We had a ruling from Judge Curtin that it was not removable.

Then it looked at the next requirement, is there an amendment or paper showing for the first time that the actual -- the action was removable, again, not on the same grounds as the prior removal? And the Court found, well , yes, there's an entirely new libel publication that is giving grounds for removal and, therefore, it's a new set of operative facts.

Again, you don't look at that initial -- you don't

have to look at the legal theory and conclude that it's the same grounds. And that really squarely applies, we believe, in our case. Again, you know --

MAGISTRATE JUDGE MCCARTHY: Let me --

MR. FLEMING: I'm sorry, Your Honor.

MAGISTRATE JUDGE MCCARTHY: Let me just interrupt for a second. But in that case, if I recall correctly, there was -- I mean, there were different material facts as to the new libel.

Here, granted there are different sites involved, but in terms of the, you know, obligations under CERCLA or otherwise or state law, I mean, what is different from what was in the original site that -- that Judge Curtin ruled on?

MR. FLEMING: So a few things, Your Honor. We would say that while the legal theories may be similar, it's an entirely different set of allegations, disconnected, disjointed.

I mean, for example, these waste sites continued into the '70's; Love Canal closed in the '40's. It's a whole 30 years of new conduct.

The plaintiffs have been alleging in these lawsuits for seven years now that the Love Canal landfill is migrating despite EPA's conclusions to the contrary, creating a public health catastrophe in the neighborhood.

Now they say, well, wait a minute, some seven years

later, it's actually coming from air emissions at the Buffalo Avenue plant. Air emissions have never been alleged previously.

There's actually, according to them, we dispute it, there's drinking water contamination which has never been alleged before. These sites -- one of them is five miles away from the Love Canal landfill. They implicate entirely different consent decrees, entirely different conduct.

One of the sites actually has a -- another entity, the Olin Corporation, the Hyde Park site, who is also responsible for the site and hasn't previously been alleged to be involved in any way.

Further, plaintiffs have tried to make the point that, you know, while it really hasn't changed because the liability is the same; an injury is an injury and your liability is the same regardless of the sources.

That's just not true. The Love Canal allegations previously involved eight other defendants. While all defendants are denying liability, to the extent that apportionment came into play, there would be eight other defendants involved in the Love Canal allegations.

In contrast with regard to these new sites, Occidental is alleged to be the only defendant responsible for those sources, which clearly would change, you know, we deny liability, the potential liability mix. So we believe, Your

Honor, that, you know, they have substantially changed the character of this case.

They also add, Your Honor, a new allegation that squarely conflicts with the consent decrees in these cases that wasn't previously alleged. They allege at paragraphs 157, I believe, and 159 that the Occidental defendants are incinerating waste, and actually seek to impose liability based on the incineration of waste at the S-Area.

Well, Your Honor, we cited in our papers at the five year review of EPA relating to that site which clearly shows that incineration was actually required under a Record of Decision entered by EPA in 1990.

So that squarely puts into play very different allegations and issues not considered by Judge Curtin previously.

MAGISTRATE JUDGE MCCARTHY: Okay, okay, thank you.

Mr. Siegel, I'll turn back to you, I guess, on that same question.

MR. SIEGEL: Thank you, Your Honor. I think Your Honor's assessment at the outset is exactly right, and I don't mean to be agreeing with you in the --

MAGISTRATE JUDGE MCCARTHY: Yeah, don't.

MR. SIEGEL: -- but, yes, the primary timeliness argument we make is that removals are untimely by years, years. If the cases were removable, they were removable way

back when the Love Canal allegations were made and there's no way around that other than to assert, as the defendants do, to doctrines that they say are exceptions to that obvious rule.

The first doctrine is they say that the case is now newly removable under 1446(b), which says if the case stated by the original complaint is not removable, but it then later becomes removable, then you -- then you have a new 30 days.

That was the statute that -- that yielded or drove the decision in the Tenth Circuit case from the 1970s they cite involving the federal judge, and I want to dwell on that case for one second.

That was a very unusual case involving a federal judge as a defendant. He removed it the first time, it was remanded, then the plaintiff did something completely inconsistent apparently in state court upon which the defendant removed again.

And what the Tenth Circuit said is what you must have under 1446(b) is -- well, this is the Tenth Circuit at page 410 of that opinion, according to the statute itself, referring to 1446(b), there must be both an amended pleading or paper and a ground for asserting removability that exists for the first time.

The defendants removed *Abbo-Bradley* and *Peirini* on federal question grounds. They were unsuccessful, but the same allegations if there was a substantial federal question

in those cases asserted by the defendants, then of course there was in the other 17 complaints.

The question is, is there now a new ground that exists for the first time, as the Tenth Circuit put it, what would that ground be? Well, the first ground is a substantial federal question. No. If that existed -- if it exists now, then it existed in the Love Canal complaints in the earlier complaints in all 19 cases.

Would that be federal officer jurisdiction? No, because that also existed. That was an available ground of removal back when all of these cases were first filed.

How do we know this? We know this from the defendants' statements themselves. I'd like to read Mr. Hogan's letter to the Court, this is his exhibit, it's exhibit -- or the defendants' exhibit, it's Exhibit 32 to their response brief, it's actually document 42-11. This is when earlier in November 2019 he is writing on behalf of all parties to acknowledge -- to let Judge Kloch know that the parties have reached an agreement and have been working together toward the filing of these amended complaints.

MAGISTRATE JUDGE MCCARTHY: Mr. Siegel, if you -- I apologize for interrupting, but do you have the -- happen to have the docket number or what exhibit was that?

MR. SIEGEL: It's docket 42-11.

MAGISTRATE JUDGE MCCARTHY: Okay, let me pull that

up. I see, okay. Give me a second. So it's a November 15th, 2019 letter to Judge -- Justice Kloch, right?

MR. SIEGEL: That's right, Your Honor.

MAGISTRATE JUDGE MCCARTHY: Okay.

MR. SIEGEL: What Mr. Hogan says in the second paragraph there is the parties thought they should provide the Court with a short report on recent developments. Plaintiffs have presented defendants with draft third amended complaint in the Abbo-Bradley lawsuit in which they seek to raise new claims similar to those they previously raised with respect to the Love Canal site, but relating to three more landfills and the Occidental Niagara Falls plant.

That is defense counsel saying these complaints are similar, and of course they are similar. They all concern the same injury claimed -- the exact same injury is -- damages are sought for the exact same injury by the same plaintiffs, and the only difference is allegations about three new sites of exposure. So that is defendants themselves saying in which the claims are "similar."

Then we have defendants' response brief in response to our motion for remand -- this is page 28 of their -- of their response in which they -- in which they acknowledge that if there was a federal officer issue in these cases, then there was a federal officer issue in the Love Canal case because this is what they say at page 28 of their response:

Just as the Occidental defendants act under color of a federal officer concerning the remediation of the three new sites under federal consent decrees, so too do they act under color of a federal officer concerning the remediation of the Love Canal site under federal consent decrees.

There's simply no way around the fact that the claims are not any different and they acknowledge this, albeit perhaps unintentionally, but they acknowledge it both in their response briefing and I think very straightforwardly in Mr. Hogan's letter to the state court in November of 2019.

Now, the other exception to this obvious timeliness problem that they have is the revival doctrine and that's the doctrine that says, well, maybe -- unlike the situation in 1446(b), if you have a case that was removable before, but you didn't remove it, but then it becomes a completely new kind of case, well then, the right to removal will be "revived."

And we have cited the cases in our -- in our briefing to the effect that this is a very rarely applied exception. They do rely on one case from this court, the *MG* case, and I think the language from the *MG* case itself explains exactly why it is not applicable here.

The *MG* case, Your Honor, we'll -- we'll remember is a case in which two plaintiffs file a lawsuit seeking $162,000 in damages. Case was removable on diversity grounds. The defendants didn't remove it; they were more concerned with

arbitration issues, so they didn't remove it, they pursued arbitrability of those issues in state court.

Then all of a sudden the plaintiffs amended the case to assert a nationwide class action on behalf of thousands and thousands of plaintiffs making new substantive allegations seeking $15 billion in damages. Kind of a new case.

And what the *MG* opinion said is if we're going -- and the MG opinion said in this kind of narrow situation, we will allow revival because it's a fundamentally new case. The liability has astronomically increased and the new factual allegations and theories are different.

And all you have to do is look at the standard set up by the *MG* case itself. The *MG* case says you can have revival if the plaintiffs' amended complaint "dramatically changes the essential character of the action."

Then the court quotes an earlier opinion from the Southern District, one of the infinite number of *MTBE* opinions, it's hard to keep them all straight, but this particular *MTBE* opinion was quoted and this is part of -- this is the *MG* -- this is this court, I believe it was Judge Larimer, yes, it was Judge Larimer quoting the *MTBE* decision saying where the newly added claims bear no resemblance -- no resemblance to the original allegations or the parties are reassigned such that, for example,

co-defendants become plaintiffs, a District Court may apply the revival exception.

Do we have that in this case? Of course we don't. Do we have an astronomical increase in the defendants' potential liability? Absolutely not. We have a massive decrease in the defendants' potential liability because the defendants acknowledge in their pleadings that between the time of the second amended complaint and the third amended complaint 500 plaintiffs were dropped from the litigation.

So what you have in this new set of third amended complaints is a massive decrease in the defendants' liability. Has the defendants' liability to any specific plaintiff increased? No, not at all. The injury is still the same.

If a particular plaintiff is claiming some, let's say, pulmonary injury or gastrointestinal injury, well, that injury hasn't changed. The only question is has the -- has the -- the only change is an assertion of additional sources of exposure.

It's kind of like filing an asbestos complaint and in the first complaint you have, you know, plaintiff was exposed to defendant's products at this job site. And then in the second complaint you have plaintiff was exposed to defendant's products at job sites B, C and D. That doesn't fundamentally change the complaint within the meaning of this revival exception.

Have the allegations themselves fundamentally changed? Have the legal theories changed? Of course not. Have the factual theories changed? Of course not.

And we know that again from the defendants' own statements, from Mr. Hogan's letter calling the allegations similar and from the defendants' response brief saying just as you've got a federal officer directing everything for these sites, you have a federal officer directing everything for the federal -- for the Love Canal site.

I think the revival exception is applied in a very, very small handful of cases. We cited this opinion, very extensive look at the doctrine from the Middle District of Tennessee, the *Slattery* case that we filed -- or that we cited. That -- that is an exhaustive -- it's almost a law review article looking at this doctrine.

In that case as it's very, very rarely applied only in extreme situations like the *MG* case, and this situation is not that case. I hope I've addressed Your Honor's concerns about that.

MAGISTRATE JUDGE MCCARTHY: Thank you. Mr. Fleming, I assume you'll have --

MR. FLEMING: Thank you.

MAGISTRATE JUDGE MCCARTHY: -- anything you want to say?

MR. FLEMING: Thank you, Your Honor.

MAGISTRATE JUDGE MCCARTHY: Go ahead.

MR. FLEMING: I appreciate it, thank you.

I didn't address the revival doctrine which I would like to do. Just preliminarily I'll mention 1446(b)(3), as I agree with the construct that I think Mr. Siegel is laying out, that we've charted really two paths here for timeliness that we believe Your Honor can rely on.

The first is under 1446(b)(3); and separately and independently we have alternative grounds under this revival doctrine.

We think, you know, it's important to look at the purpose of these rules and the doctrines when we're applying them and the policies surrounding the whole timeliness provisions, especially when federal officer removal is at stake, which as you know from your *Badilla* opinion creates a presumption actually in favor of removal.

But the timeliness provisions, they're not really designed as, you know, gotcha's to prevent defendants from getting to federal court, especially when federal officer jurisdiction is asserted.

But, rather, they're there to discourage parties from quote/unquote sleeping on their rights or litigating in state court and seeing how they fair and then tactfully -- you know, tactically deciding to gain an undue advantage by removing to federal court.

And the procedural history here shows nothing of the sort is at issue. We removed back in 2013 and Judge Curtin decided that the actions were not removable.

When we had live complaints, we removed right away in 2020 raising these new grounds.

But on 1446(b)(3) -- before returning, Your Honor, to the revival doctrine, you know, again I just reiterate it doesn't matter if federal officer jurisdiction's asserted previously then again; it doesn't matter if federal question jurisdiction is asserted previously then again.

That *O'Bryan* case from the Tenth Circuit, which the *MG* decision of the Western District of New York also cites and quotes, similarly says that the legal phrase "same grounds" does not mean the same cause of action or theory of recovery, right?

The different grounds -- this is quoting the case -- more precisely mean a different set of facts that state a new ground for removal.

So we would submit again that it's -- it's neither here nor there that federal question jurisdiction was asserted before is asserted now, if these are here nor there that federal officer allegations could have been asserted against the Love Canal allegations previously. That's the legal theory.

What's changed is this new set of operative facts.

That's -- those are the new grounds relating to these three new sites.

So, Your Honor, we would say that under the statute 1446(b)(3) we can avail ourselves to it because the action was not previously removable as I've explained.

But if you wanted to go into alternative grounds, we believe the revival doctrine squarely applies here and it's not, you know, narrowly applied, we believe, as the plaintiffs make it out to be.

The *MG* decision again of this district, Judge Larimer, I mean, this is quoting from the opinion, he specifically states "there's a considerable long-standing body of case law, long-standing body of case law, that holds that an amendment that substantially changes the character of a lawsuit can give rise to a new right to remove, irrespective of whether the legal basis for removal is the same as before."

So it's a substantial change to the character of the lawsuit. He's very quick to point out I think, unlike some of the, you know, arguments in plaintiffs' briefs, that there is no litmus test for this revival doctrine, right?

It doesn't -- you don't have to have a conversion to massive liability, although I think we've explained there is a change in Occidental's liability even though it denies it.

This is a case-by-case analysis. This is the

opinion saying that you've got to view the facts against the reasons for both the 30 day rule and the revival exception.

And, again, going back to the 30 day rule, we don't believe we bump into any of the policy reasons for having the 30 day timeliness provisions, but we believe we fall squarely under kind of the purpose and poly -- policy of this revival exception.

I mean, imagine the scenario here where seven years into the litigation for the first time they're bringing in three entirely different CERCLA sites, entirely different regulatory structures and consent decrees, and the toxic tort case, different chemicals they're now alleging are causing these people's injuries purportedly, different exposure, migration pathways.

Before supposedly chemicals were emanating from the Love Canal landfill through the sewers. Now there's air deposition from the Buffalo Avenue plant. Now there's migration from these three different sites in different areas not even all in Niagara Falls; some in Niagara.

Now they're alleging water contamination, drinking water contamination. I mean, this substantially changes the character of a toxic tort lawsuit.

I mean, plaintiffs simply can't, you know -- I don't know when they first decided to make these allegations. We know they presented them to us and they requested a

settlement. If we didn't settle, they would file these claims. We declined. And then, you know, we're off to the races here in 2020.

So we think it would be completely unfair for the plaintiffs to be able to inject -- substantially change the character of the case, all of these different sites and different chemicals and not have us allowed to remove, to have us basically precluded.

We don't believe that the rules provide for such, you know, in the federal officer context, kind of a begrudging interpretation of the rules and we think the revival doctrine would squarely apply.

You know, we think that the *Residents and Families United* case from the Eastern District of New York in 2017 shows that this is a case-by-case analysis and the facts, you know, don't always have to be nearly as extreme as we believe the plaintiffs argue.

There the plaintiffs challenged housing policies by the defendant and asserted that they were violating (inaudible). Defendants didn't remove even though federal question jurisdiction was inarguably stated.

Later the plaintiff amended the complaint to add that the housing policies violated a settlement agreement, not just regulations. The defendant removed and argued that, hey, that injected a constitutional question that gave grounds for

removal.

The plaintiff argued, well, it was previously removable. The Court found under the revival doctrine that they really substantially changed the character of the case because the plaintiffs' target was no longer just the regulations. The defendant was the same, but the target conduct was no longer violations of the regulations only. It now was violations of the settlement agreement.

And here the target conduct that the plaintiffs are making in this amended complaint is no longer, after all this time, it's no longer -- Occidental's disputed it, EPA has ruled repeatedly that the Love Canal landfill is not migrating as plaintiffs purport to allege here -- but, nevertheless, they've been alleging that for seven years.

Now all of a sudden again they say you know what? We actually think that it's coming from way over here, five miles away, a totally different theory of migration.

In a toxic tort suit, I can't think of anything more fundamental that would change the character of the suit than changing the theory of migration, then changing the location , then changing the people involved, then changing the chemicals at issue. This is a dramatic change.

So not to belabor it, Your Honor, but we believe you would be on ample grounds to rely on the revival doctrine as well and I think when you, you know, take a look again at

the *MG* case, you'll see that it very clearly describes the revival doctrine in the Western District as a case-by-case analysis that is heavily fact dependent and doesn't require the extreme changes that I believe plaintiffs argue.

MAGISTRATE JUDGE MCCARTHY: All right, thank you.

MR. SIEGEL: Can I respond just briefly to that, Your Honor?

MAGISTRATE JUDGE MCCARTHY: Yes, Mr. Siegel.

MR. SIEGEL: Thank you, Your Honor. Just very briefly about this appeal to the underlying purposes of the revival doctrine.

Yes, it is a case-by-case analysis. It is an extremely rare situation in which that analysis leads to an application of revival.

The courts -- and this is true for any kind of subject matter jurisdiction basis, the Second Circuit has held that courts strictly enforce the timeliness requirements when it comes to removal.

And -- and if Your Honor -- Your Honor already has plenty of briefing to read, but we're happy to submit plenty of cases, a further brief with plenty of cases showing that even when it comes to federal officer removal, cases are routinely remanded for failure to satisfy the timeliness requirements.

Assuming that it is a case-by-case analysis, we are

perfectly happy to have ourselves compared to the *MG* case. That was a dramatic total restructuring of the case that went from $162,000 in liability to $15 billion.

And as I said, what we have here is a massive decrease in the defendants' liability.

The defendants -- Mr. Fleming just cited the case from the Eastern District, the *Residents and Families United* case. We're happy to be compared to that case, too. This is one of the rare examples in which a District Court in this circuit has granted or has upheld removal on the basis of the revival doctrine.

What that court said, what Judge Garaufis said in that case was referring to the second amended complaint, which was the complaint that yielded removal, the second amended complaint, therefore, introduces, one, a different legal theory, the right to free speech rather than the right to intimate association; two, involving a different class of victims -- the adult home operators versus the adult home residents; and, three, premised on a new set of facts -- what the operators can and cannot say to the adult home residents in the course of their work.

Do we have anything like that in this case? We don't have a different legal theory. We're still proceeding on basic garden variety New York common law tort -- toxic tort theories.

We don't have a different class of victims. The victims are still exactly the same except there are 500 fewer of them.

It is a -- again, it is true that once in a while you find a court applying this doctrine, but we cited -- I believe we cited the most recent case we could find from this circuit, from a district in this circuit, this is the *Rivera* case from the District of Vermont in 2020 where Judge Reis says the revival doctrine is a narrow, judicially created exception to the 30 day rule and all doubts should be resolved in favor of remand. And she did not allow -- she did not uphold removal in that case.

As to the purposes here, as to the -- as to the idea that -- that a sort of overly strict application of the timeliness rules will prevent, you know, a case from being in federal court that really ought to be in federal court, you know, I really -- I want to correct a misstatement that I believe Mr. Fleming made unintentionally.

There were -- it is after Judge Curtin ruled in the *Abbo-Bradley* and *Peirini* cases, then came the filing of all of the other complaints. And in those complaints, yes, we made allegations about the Love Canal site. They were not removed.

So -- so if they believed, you know, strongly that there should be some -- that Judge Curtin was wrong or that these cases really did present a federal officer contention,

they could have removed those cases; they could have removed them certainly on federal officer grounds because they now say that Love Canal is proceeding under the -- under the guidance of federal officers just like the other sites. Judge Curtin did not pass on federal officer jurisdiction.

Why didn't they remove those cases then?

Lastly, Your Honor, as to the underlying purposes of the doctrine, one of them is -- the main one is, is it unfair to keep the defendant in state court when the nature of the case has radically changed, and I think I've dealt with that.

But another one is, is it fair to make the plaintiffs start all over again in federal court? Well, no, it's not. And -- and we respectfully say that that is perhaps very acutely applicable here because this case has been going on a long time in state court.

There is -- there is a sort of, you know, good natured dispute in the pleadings as to exactly how much has really happened and whose fault that is and so on, but the case has been pending for a long time in state court.

I believe that anybody in this case will tell you that Judge Kloch has invested a terrific amount of time in shepherding this litigation along, and now we're told, well, you need to start all over in federal court.

That is not fair and it is particularly not fair

and I think we have to advert briefly to the external circumstances here. This is -- this district is an extremely backlogged district despite the heroic efforts of everyone on the bench. It would be a --

MAGISTRATE JUDGE MCCARTHY: We appreciate that comment.

MR. SIEGEL: -- and it would be a massive undertaking to all of a sudden plop this 19 complaint toxic tort litigation down in the -- in the Western District of New York, particularly when all court proceedings as we, unfortunately, know are being slowed down anyway and we don't know how long that state of affairs is going to continue.

So I don't think there's any unfairness here about not applying the revival doctrine. And I also don't think it was made for a case like this. It was made for a truly unusual case like the *MG* case. Thank you.

MAGISTRATE JUDGE MCCARTHY: All right, thank you.

MR. FLEMING: Your Honor?

MAGISTRATE JUDGE MCCARTHY: Yeah, Mr. Fleming?

MR. FLEMING: I'm sorry, Your Honor. Did I interrupt you? I didn't mean to do that.

MAGISTRATE JUDGE MCCARTHY: No, no, I was just -- you seem like you wanted to say something. And I will just -- I will hear you, but I will point out we've now been at this an hour, so I'll give you a brief rebuttal opportunity.

And then I was going to say to both of you and anybody else who is interested, someone made a generous offer to cite more cases to me, I think I've got a lot of cases, but in the interest of completeness, I would give everybody until a week from tomorrow to make any letter brief submissions that they feel would advance the ball, not replies or anything, just based on what you've heard today.

But with that, Mr. Fleming, go ahead.

MR. FLEMING: Thank you, Your Honor, and I'll try to be as concise as I can. I appreciate Mr. Siegel's comment about a misstatement that he thinks I may have unintentionally made.

I'm not sure what the statement was, but I can say that, yes, it is true when defendants initially removed to federal court there were two cases and Judge Curtin determined that they were not removable.

And a year or two after that plaintiffs filed 16 new complaints and then ultimately another totaling 19. And defendants did not remove those. We didn't think removal would have been well received when Judge Curtin decided based on the Love Canal allegations that the actions were not removable.

So I hardly think the defendants could be faulted for not removing allegations that Judge Curtin had just decided were not removable.

And I think under the law it's clear that when removal is presented to the federal court, the federal court should consider not only the grounds that are submitted in support of removal, but any grounds on which subject matter jurisdiction may exist.

And then just briefly on the notion that, you know, we would be starting all over again, Mr. Siegel's right, there has not been a lot that has happened in state court. I think there's been one appearance in person in the last five years. There have been negotiations on a Case Management Order now for, I think, three years.

I'm not aware of a single deposition being taken; production of documents by defendants; there's been very little that has actually happened.

Plaintiffs sought to recuse Justice Kloch and appealed it.

There was a split sampling injunction order where defendants requested the right to be present for any sampling that plaintiffs did. Plaintiffs fought that and we got granted the injunction. They appealed it and it was affirmed in substantial part by the Fourth Department.

So there has not been a lot of activity. We don't believe there would be duplication of efforts, especially if you consider of course that as -- I won't repeat the argument, but the action now has been substantially transformed based on

these new allegations. There can be no duplication of work as to a substantial part of the case because they haven't been in the case until now.

And of course with all due deference to any court's docket, we do believe that under the federal officer removal provision, we have an absolute right to remove.

MAGISTRATE JUDGE MCCARTHY: All right, thank you. Thank you both. It's well-briefed, well-argued on both sides.

As I indicated, I will give you an opportunity through June 5th to submit any -- and I'm not encouraging you to do this, but if there's something you want to bring to my attention, you may do so by June 5th, and then I'll deem the motion submitted.

As you all know, whatever my recommendation is will be then reviewed by District Judge Geraci and we'll take it from there.

Those of you who haven't spoken today, I thank you for that, but it's good to see you all and everybody stay well and stay -- stay safe, okay?

MR. FLEMING: Thank you very much, Your Honor.

MR. SIEGEL: Thank you, Your Honor.

MAGISTRATE JUDGE MCCARTHY: Mr. Siegel, yes?

MR. SIEGEL: May I inquire if Your Honor has any particular questions about the merits of the subject matter jurisdiction contentions?

MAGISTRATE JUDGE MCCARTHY: No. I mean, as -- as indicated, I have reviewed your papers carefully and I will be reviewing them more than once again carefully. So I think with this we'll draw the oral argument to a close, okay?

MR. SIEGEL: Thank you.

THE CLERK: Judge? I'd like to amend today's appearances to include Thomas DeBoy for the City of Niagara Falls.

MAGISTRATE JUDGE MCCARTHY: All right, I saw Mr. DeBoy logged in shortly after we began. So, Tom, if there's anything you missed, I'm sure somebody will fill you in.

Thank you all.

MR. SIEGEL: Thank you, Your Honor.

MR. FLEMING: Thank you very much, Your Honor.

(**WHEREUPON**, proceedings adjourned at 3:06 p.m.)

* * *

CERTIFICATE OF TRANSCRIBER

In accordance with 28, U.S.C., 753(b), I certify that this is a true and correct record of proceedings from the official electronic sound recording of the proceedings in the United States District Court for the Western District of New York before the Honorable Jeremiah J. McCarthy on May 28th, 2020.

S/ Christi A. Macri

Christi A. Macri, FAPR-RMR-CRR-CSR(CA/NY)
Official Court Reporter